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IN THE
COURT OF APPEALS OF INDIANA

EMIL GARVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0810-CR-608
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0708-MR-2616

June 4, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Emil Garver ("Garver") was convicted in Vigo Superior Court of Class A felony battery resulting in death. He was sentenced to a term of thirty-five years. Garver appeals and argues that the trial court abused its discretion in admitting his statement to police and that the evidence was insufficient to support his conviction. We affirm.

Facts and Procedural History

K.F. was born on August 12, 2005, to Heather Flanagan ("Heather") and Isaac Flanagan ("Isaac"). Heather and Isaac subsequently separated. In August of 2007, Heather lived with her sister, Lori Fowler ("Fowler"), their mother, Deborah Pullen ("Pullen"), Heather's other child, and Lori's three children. At the time of the incident, Heather was involved in a romantic relationship with Garver, who lived with Heather and K.F. Garver, Heather, and K.F. slept in the same bedroom on a mattress placed on the floor.

On the morning of August 15, 2007, Garver was at work, and Heather, Fowler, Pullen, and the children were at the house. During the day, K.F. acted normally but seemed lethargic after his afternoon nap. At 3:45 p.m., Heather left for work. At 5:00 p.m., Garver returned from work and attempted to put K.F. down for a nap.

Fowler returned home at around 6:30 p.m. and fed K.F. dinner, which K.F. threw up. K.F. did not have a fever at the time. At 9:30 p.m., Garver took K.F. to bed. K.F. did not want to go to sleep and cried for a short time. Eventually, they both fell asleep.

Later that night, Garver came out of the bedroom carrying K.F.,who was limp and not breathing. Garver told Fowler that K.F. had stuck his finger in a light socket. Fowler told Pullen then Fowler ran to a neighbor's house to call for an ambulance. Pullen

checked K.F.'s mouth for obstructions and, finding none, attempted CPR on K.F.. K.F. vomited while Pullen performed CPR. Garver then said that he thought "K.F. had hit his head because he reared back in the bed." Tr. pp. 142-43.

When an ambulance arrived, Advanced EMT Paul Chalos ("Chalos") observed that K.F. was not breathing and that his skin color was grayish-blue. Chalos cleaned out K.F.'s mouth and decided that there was not enough vomit to obstruct the airway. He began CPR. While this occurred, Garver showed EMT Jay Umbaugh ("Umbaugh") the outlet where he thought K.F. had been electrocuted. Umbaugh noted that the outlet was in perfect condition and concluded that K.F. had not put his finger in the outlet. The ambulance transported K.F. to Union Hospital where he was transported to Riley Hospital. Chalos saw no signs of electrocution on K.F. during this time.

Garver remained at the house and was upset. He told Fowler that K.F. had fallen off the bed and hit his head. When Pullen returned from the hospital, Garver was still upset and told her that he was sorry and didn't know what happened because he was asleep. Garver then left. A police officer visited the house and found no evidence of electrocution in the bedroom in question.

At 6:30 a.m. on August 16, 2007, Terre Haute Police Detective Shawn Keen ("Detective Keen") found Garver and asked to speak with him. Detective Keen and Garver went to the police department, where Garver was advised of his rights. Garver then signed a waiver of his rights.

During the first police interview, Garver said that he arrived home around 5:00 p.m. and that K.F. took a nap at that time. K.F. woke from his nap and played for the rest

of the evening and seemed normal but did not eat. Garver put K.F. to bed between 8:45 and 9:00 p.m. K.F. was fussy and did not want to sleep. Initially, Garver told Detective Keen that he had put K.F. down, turned on the TV, and they both fell asleep.

Detective Keen challenged Garver's account as not being consistent with K.F.'s injuries. Garver then changed his story and added that K.F. tried to get out of bed but that Garver had put his hand on K.F.'s chest and shoved him back into the bed. K.F. tried to get up again and Garver shoved him back down again. Garver said that he did not think that K.F. had hit his head. Garver denied hurting K.F. and said that K.F. was breathing at the time. Garver says that they then watched TV until they fell asleep. Garver said that he awoke when he heard a thud and saw K.F. lying by the outlet.

K.F. died on August 16, 2007 at 1:19 a.m. Dr. Ralph Hicks ("Dr. Hicks"), a professor of clinical pediatrics at Indiana University School of Medicine, who practices primarily in the area of child abuse pediatrics, was asked to examine K.F. After the examination, Dr. Hicks concluded that K.F. had "died from asphyxiation that was inflicted and non-accidental, or abusive." Tr. p. 523.

On August 18, 2007, Dr. Kent Harshberger ("Dr. Harshberger"), a forensic pathologist, performed an autopsy on K.F. Dr. Harshberger noted small areas of bleeding from the capillaries around K.F.'s neck area. There also appeared to be an indication of increased pressure in that area as well. This injury occurs as a result of increasing pressure in the chest or neck which causes the capillaries in the area to burst. Dr. Harshberger determined that the pressure had increased in the lower neck or in the chest cavity.

Additionally, Dr. Harshberger noted small individual contusions on the top of K.F.'s skull consistent with fingertips being pressed against the skull. The contusions were recent and were not consistent with injuries from resuscitation efforts. Also, the bruising could not have been caused by K.F. hitting his head on the floor or on a table.

Dr. Harshberger concluded that K.F. died as a result of brain damage due to lack of oxygen. Neither Dr. Harshberger nor Dr. Hicks thought that the death was likely to have occurred from lack of oxygen related to vomit from CPR being breathed into K.F.'s lungs. K.F.'s death was ruled a homicide.

On August 20, 2007, Detective Keen interviewed Garver again and advised him of his rights. During this interview, Garver stated that he could have accidentally rolled over on K.F. and might have shoved K.F. off, causing K.F. to fall onto the floor.

On August 21, 2007, the State charged Garver with murder, Class A felony battery resulting in death, and Class A felony neglect of a dependent resulting in death. Following a jury trial on July 22-28, 2008, Garver was convicted of Class A felony battery resulting in death but not guilty of murder and Class A felony neglect of a dependent resulting in death. On October 15, 2008, the trial court sentenced Garver to a term of thirty-five years. Garver now appeals.

I. Admission of Statement to Police

Garver first argues that the trial court abused its discretion by admitting into evidence Garver's August 20, 2007 statement to police. Specifically, Garver objects to statements made by Detective Keen during the interrogation regarding his belief in Garver's guilt and Detective Keen's reliance on hearsay statements. The admission and

exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id.

Garver sought to suppress his August 20, 2007 videotaped statement to police prior to trial based on Indiana Evidence Rules 704(b) and 802. Specifically, Garver objected to statements by Detective Keen that Garver felt constituted improper opinion and inadmissible hearsay. The State argued that Detective Keen's statements were meant to elicit a response from Garver, not to be considered for the truth of the matter asserted or "as to his opinion regarding Garver's truth or innocence." Appellant's App. p. 351. The trial court determined that while the videotaped statement did contain many hearsay statements and opinions of intent by Detective Keen, an admonition by the trial court to the jury prior to the playing of the video would be sufficient.

At trial, Garver objected to the admission of the August 20, 2007 statement. The trial court overruled the objection and admonished the jury regarding the videotape. The trial court admonished the jury as follows:

> Ladies and gentlemen of the jury, on the videotape that you're about to see, there are statements made by Detective Keen, Detectives Keen and Adamson. And I want to instruct you that what the police officers say in the course of the interview, the police officers' information, whatever they say, is not evidence, and is not to be considered by you as evidence. It is to be considered only questioning and questions in order to elicit information to draw out information from Mr. Garver. [] There are certain things that the police officers say and representations that they make that may or may not be true. They are not to be considered as evidence, other than to bring out information from Mr. Garver.

Tr. pp. 820-21.

Garver argues that the trial court did not tell the jury that the police officers' statements were inadmissible opinion evidence or based on inadmissible hearsay. He also bases his argument on the number of alleged violations in the August 20, 2007 statement. Garver recognizes that the trial court admonished the jury that the police officers' statements were not evidence and that their representations may or may not be true.

"Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003) trans. denied. Under the facts and circumstances before us, the trial court's admonishment to the jury was sufficient to cure any potentially objectionable statement regardless of whether the trial court specifically noted that the police officers' statements were inadmissible opinion or hearsay. The trial court did not abuse its discretion when it admitted Garver's August 20, 2007 statement to police into evidence.

II. Sufficiency of the Evidence

Garver next argues that the evidence was insufficient to sustain his conviction for Class A felony battery resulting in death. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences to be drawn therefrom to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a

reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. If inferences may be reasonably drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt then the circumstantial evidence will be sufficient. Id.

Under Indiana Code section 35-42-2-1(a)(5) (2004):

> A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> > (5) a Class A felony if it results in the death of a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age[.]

The following evidence supports Garver's conviction: (1) K.F. stopped breathing while in the sole and exclusive care and custody of Garver; (2) K.F. had been acting normally earlier in the evening; (3) Garver admitted to shoving K.F. back into bed two times; (4) Garver gave police inconsistent statements regarding what happened to K.F.; (5) K.F. had bruises on the top of his head consistent with fingertips pressed against the skull; (6) K.F. had injuries consistent with pressure to the lower neck or chest region; (7) Dr. Harshberger determined that K.F. died of brain injury due to lack of oxygen and that the death was not accidental; and (8) Dr. Hicks determined that K.F. had "died from asphyxiation that was inflicted and non-accidental, or abusive[.]" Tr. p. 523.

Garver attempts to frame the argument as whether a crime was committed at all rather than an argument of who committed the crime. However, Dr. Hicks and Dr. Harshberger agreed that the death was not accidental. In fact, Dr. Harshberger determined that the cause of death was homicide. Tr. p. 344, Ex. Vol., State's Ex. 10, 11.

Based on this evidence, a crime occurred, and we must turn to the question of who committed the crime.

The testimony of Dr. Hicks and Dr. Harshberger establish the inference that K.F. died from a lack of oxygen likely caused by pressure to the neck and upper chest. Garver relies on his own expert witness, Dr. Pless, to provide a different view of the evidence. However, on appeal, we consider only the evidence favorable to the conviction, and we do not reweigh the evidence or review witness credibility. Jones, 783 N.E.2d at 1139.

The evidence presented at trial also establishes that Garver had the sole and exclusive opportunity to commit the charged Class A felony battery resulting in death. Our supreme court has held that where a person has the sole or exclusive opportunity to commit a crime, it is almost conclusive evidence of guilt. See Hutchinson v. State, 248 Ind. 226, 225 N.E.2d 828 (1967); Mobley v. State, 227 Ind. 335, 85 N.E.2d 489 (1949). In Woodrum v. State, 498 N.E.2d 1318 (Ind. Ct. App. 1986) and Phelps v. State, 453 N.E.2d 350 (Ind. Ct. App. 1983), we held that sole or exclusive opportunity, when coupled with other circumstances, may be sufficient to support a finding of guilt, and even the means and manner of death may be inferred from the proven circumstances.

Two examinations of K.F. determined that his death was not accidental. K.F. acted normal before going into the bedroom to sleep. During the entire period from entering the bedroom to exiting the bedroom, K.F. was in the sole and exclusive custody of Garver. During the time in question, K.F. suffered injuries that resulted in his death. Garver's statements concerning K.F's death were seriously inconsistent with each other but consistent in their inferences that the injuries K.F. sustained while in Garver's sole

and exclusive custody were less than an accident. Under these facts and circumstances, the evidence is sufficient to support Garver's conviction for Class A felony battery resulting in death.

Conclusion

The trial court did not abuse its discretion when it admitted Garver's August 20, 2007 statement to police into evidence during his jury trial. The evidence was sufficient to support Garver's conviction for Class A felony battery resulting in death.

Affirmed.

RILEY, J., and KIRSCH, J., concur.